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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROY BERNARD ENGEBRETSON, Appellant.	)	2 CA-CR 2007-0280 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063110

Honorable Richard Nichols, Judge

AFFIRMED

R. Lamar Couser — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 Appellant Roy Engebretson was charged with possession of a dangerous drug for sale and possession of drug paraphernalia after he sold methamphetamine to an undercover police officer. Engebretson did not appear for portions of his June 2007 jury

trial. The jury found him guilty of both charges, after which the trial court issued a warrant for his arrest. He was subsequently arrested and sentenced to concurrent, mitigated prison terms of fourteen years on count one and three years on count two, terms that were enhanced by his two historical prior felony convictions. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), finding no "meritorious and non-frivolous issues which might result in a reversal." Engebretson has filed a pro se supplemental brief, but none of the issues he raises, which we address below, warrants reversal.

¶2 "We view all facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). The evidence established that an undercover officer was introduced to James Moore, a known drug dealer, by another officer. The officer told Moore she wanted to buy methamphetamine, which Moore arranged, introducing the officer to Engebretson. Engebretson weighed the drugs, placed half an ounce into a bag, and gave it to the undercover officer. The officer gave Moore a portion of the drugs—"a useable pinch"—as payment for arranging the transaction. Engebretson was apparently arrested about two months later on other charges and subsequently charged with the instant offenses. The officer identified Engebretson at trial as the person who had sold her the methamphetamine.

¶3 Engebretson first argues that the undercover officer's "entire investigation was tainted by her illegal activities and any information or evidence garnered from such

unorthodox and dangerous pursuits, should not [have] be[en] permitted to be used in a court of law." Engebretson is referring to the fact that the officer had associated "with a known drug addict, James Moore"; provided Moore with drugs "to sustain his abusive behavior, in order to promote her sting operations"; watched as Moore injected drugs; and gave Moore "a pinch for his share" in connection with the transaction that led to Engebretson's arrest. Engebretson argues a significant portion of the methamphetamine was unaccounted for, which posed a risk to public health and safety. Because this argument was not made below, Engebretson forfeited the right to review of this claim for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶4 Engebretson has cited no authority, nor are we aware of any, to support the proposition that evidence obtained during the course of an officer's undercover investigation of drug operations is inadmissible if the officer engaged in conduct that could be characterized as dangerous or that would be illegal if an ordinary citizen engaged in that conduct. Indeed, among those persons to whom the drug offense laws, *see* A.R.S. §§ 13-3405 through 13-3409, do not apply are "[o]fficers and employees of the United States, this state or a political subdivision of the United States or this state, while acting in the course of their official duties." A.R.S. § 13-3412(A)(4). We see no error, much less error that can be characterized as fundamental.

¶5 Engebretson next contends the trial court erred in admitting the state's exhibit two into evidence. That exhibit was a computer-generated booking photograph of Engebretson taken a couple of months after the drug transaction. It was through this photograph that the undercover officer was able to identify Engebretson as the person involved in the drug transaction. As we understand Engebretson's argument, it is that the photograph should not have been admitted into evidence because it was obtained as a result of an unconstitutional stop and a subsequent unlawful search of the vehicle.

¶6 The only objection raised in the trial court to the admission of the photograph was insufficient foundation, which appears to have been resolved during a bench conference. Therefore, Engebretson once again had the burden of establishing any error was both fundamental and prejudicial, *see Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607, a burden he has not sustained. But even assuming arguendo that Engebretson preserved the issue by raising it in his pro se motion to continue the sentencing and request for evidentiary hearing, which he filed almost two months after the trial, he nevertheless has failed to establish a sufficient basis for reversing his convictions. The argument is cursory and wholly lacking in supporting authority. Nor is there any factual support for his arguments in the record before us. Moreover, even assuming as true that the photograph was obtained as a result of an unlawful stop, search, and arrest, any error was clearly harmless. The undercover officer identified Engebretson at trial as the person who had sold her methamphetamine, and this evidence was sufficient to support the convictions.

¶7 We also reject Engebretson's contention that the methamphetamine he sold to the undercover officer was erroneously admitted into evidence because it had been tampered with before it was tested and may have been contaminated or exchanged while it was held in evidence. When the drugs were admitted into evidence as exhibit four, defense counsel stated he had no objection. And Engebretson has not established any error occurred as a result of the admission of the drugs, much less error that can be characterized as fundamental. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. The officer identified the methamphetamine as the substance she had obtained on the date of the drug transaction, establishing a sufficient chain of custody to warrant its admission.

¶8 Finally, Engebretson maintains the trial court erred when it denied his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. He asserts there was insufficient evidence to support the convictions. He points to what he regards as flaws in the undercover officer's testimony, based on both her purported disregard for police policies and procedures and her failure to provide sufficient identification evidence establishing he was the one who had sold her the drugs.

¶9 A judgment of acquittal is only appropriate when there is no substantial evidence to prove each element of the charged offense. Ariz. R. Crim. P. 20(a); *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). Substantial evidence is evidence "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d

51, 53 (1980). If reasonable persons could differ as to whether the evidence establishes a fact in issue, the evidence is substantial. *State v. Atwood*, 171 Ariz. 576, 597, 832 P.2d 593, 614 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

¶10 The undercover officer described the events that led to the filing of these charges. She described meeting Engebretson through Moore and explained how Engebretson had weighed the methamphetamine on his scales, put it in a bag for her, and given her the bag after she paid him $450 for the drugs. The officer identified Engebretson as the person in the photograph and then identified him in court as the person who had sold the drugs to her. This was more than sufficient evidence to establish Engebretson had possessed methamphetamine for sale and had possessed drug paraphernalia, identified in the indictment as a "baggie." *See* A.R.S. §§ 13-3407, 13-3415.

¶11 The convictions and the sentences imposed are affirmed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge